Supreme Court, U. S.
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in the Supreme Court of the United States

_____ TERM

NO. 72-852

STEVEN ZATSKY,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MIAMI REVIEW — 371-4853 — 377-3721

INDEX

	Page
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	3
STATEMENT	4
REASONS FOR GRANTING THE WRIT	4-11
CONCLUSION	11
CERTIFICATE OF SERVICE	12
APPENDIX A	App. 1-2
APPENDIX B	App. 3-9

TABLE OF AUTHORITIES

Cases	Page
Gibbons v. Ogden 22 U.S. (Wheaton) 16 L.Ed. 23 (1823)	5
Heart of Atlanta Motel v. United States 379 U.S. 241 (1964)	7
Leary v. United States 395 U.S. 6 (1969)	9
Polish National Alliance v. Labor Board 322 U.S. 643, 650 (1944)	7
Rewis v. United States 401 U.S. 808 (1971)	8, 10
Rochin v. California 342 U.S. 165, 96 L.Ed. 183 (1952)	6
Screws v. United States 325 U.S. 91, 89 L.Ed. 1495 (1945)	5
United States v. Bass 434 F.2d 1296 (2nd Cir. 1970)	7, 9
United States v. Bass __ U.S. __, 30 L.Ed.2d 488 (1971)	7, 9
United States v. Denmark 346 U.S. 411, 462 (1953)	7
United States v. Hudson 11 U.S. (7 Cranch) 32	7

TABLE OF AUTHORITIES (cont.)

CONSTITUTIONAL AND STATUTORY AUTHORITY

	Page
Constitution of United States, Article I, Sec. 8	3, 6
Constitution of the United States, Amendment X	3, 10
Title 21, United States Code §841(a)(1)	2, 3, 5
Title 21, United States Code §846	2, 3, 5
Title 21, United States Code §801(1)(7)	9

OTHER AUTHORITIES

Hearings before the Subcommittee on Public Health and Welfare of the Committee on Interstate and Foreign Commerce — House of Representatives	
Parts I and II Serial Numbers 91-45 and 91-46, H.R. 11701 and H.R. 13743	8, 9
1970 U.S. Code Cong. and Adm. News 4566, 4569	9
Florida Statute, Chapter 398, F.S.A.	10
Florida Statute, Chapter 833, F.S.A.	10

In the Supreme Court of the United States

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NO. _____

STEVEN ZATSKY,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, STEVEN ZATSKY, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered November 2, 1972.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, ___ F.2d ____, has not as yet been reported, but said opinion was filed November 2, 1972, and is represented by Appeal Number 72-2325. A copy of said opinion is reproduced in Appendix A to this Petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was made and entered on November 2, 1972, and reproduced in Appendix A of this Petition. The jurisdiction of this Court is invoked under Title 28, United States Code §1254(1) and Rule 19(1)(b), United States Supreme Court Rules.

QUESTIONS PRESENTED

I

Whether Title 21, United States Code §841(a)(1) and §846 of the Drug Abuse Prevention and Control Act are unconstitutional by reason of said Sections not being within the legislative power of Congress to enact such legislation under the Commerce Clause of Article I, Section 8 of the Constitution of the United States.

II

Whether Title 21, United States Code §841(a)(1) and §846 of the Drug Abuse Prevention and Control Act are unconstitutional by reason that said legislative enactment is an invasion of the States' residual power as provided by the Tenth Amendment of the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

I. CONSTITUTION OF THE UNITED STATES, AMENDMENT X:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

II. CONSTITUTION OF THE UNITED STATES, ARTICLE I, SECTION 8:

"The Congress shall have power . . . to regulate commerce with foreign nations and among the several States . . ."

III. UNITED STATES CODE, TITLE 21:

"Section 841(a)(1) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; . . ."

"Section 846 Any person who attempts or conspires to commit any offense defined in this Title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

STATEMENT OF THE CASE

On March 9, 1972, the Petitioner was charged in Count One of a nine count Indictment with conspiracy to commit offenses against the United States of America, to-wit: to violate Title 21, United States Code §841(a)(1) (App. B). The Petitioner entered a plea of Not Guilty. Thereafter, Petitioner filed a Motion to Dismiss. The Motion to Dismiss, which attacked the constitutionality of Title 21, United States Code §841(a)(1) among other sections, was denied by the Trial Court (R. 58).

During the course of the trial, Petitioner indicated his desire to change his plea on Count One to nolo contendre reserving his right to challenge on appeal the constitutionality of Title 21, United States Code §841 and related sections.

The Court accepted the change of plea and after examination adjudicated the Defendant guilty of Count One of the Indictment.

On May 23, 1972, the Defendant was sentenced to fifteen months in prison followed by a special parole term of three years (R. 87).

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed by the Court for the following reasons:

I

The argument with regard to both questions raised will be argued jointly although stated separately.

Title 21, United States Code §841(a)(1) and §846 of the Drug Abuse Prevention and Control Act are unconstitutional because the Statutes do not require proof that the drugs in question were involved in interstate or foreign commerce. This Court has not had an opportunity to rule on the constitutionality of Title 21, United States Code §841(a)(1) and §846. The decision of the Court of Appeals in the within cause has decided an important question of Federal Constitutional law which should be decided by this Court.

There is no question that Congress is without power to regulate matters which do not affect interstate or foreign commerce. Congress has no general grant of police power under the Constitution to enact criminal legislation designed to preserve law and order. That power is exclusively reserved to the States under our federal system of government. Chief Justice Marshall in *Gibbons v. Ogden*, 22 U.S. (Wheaton) 16 L.Ed. 23 (1924), first recognized the residual police power of the several States as exercised in an "immense mass of legislation which embraces everything within the territory of a State not surrendered to the general government; all of which can be advantageously exercised by the States themselves." One of the most traditional applications of the police power reserved to the States is the mass of criminal legislation to preserve law and order.

In this vein, this Court in *Screws v. United States*, 325 U.S. 91, 89 L.Ed. 1495 (1945) stated:

> "Our national government is one of delegated powers alone. Under our Federal System the administration of criminal justice rests within the States except as Congress, acting within the

> scope of its delegated powers, has created offenses against the United States. *Jerome v. United States*, 318 U.S. 101, 105, 87 L.Ed. 640, 643, 63 S.Ct. 483. As stated in *United States v. Cruikshank*, 92 U.S. 542, 553, 554, 23 L.Ed. 588, 592, 'It is no more the duty or within the power of the United States to punish for conspiracy to falsely imprison murder within a State, than it would be to punish for false imprisonment or murder itself.' Id. at 109.

Again, the Court in *Rochin v. California*, 342 U.S. 165, 96 L.Ed. 183 (1952), stated:

> "In our Federal System the administration of criminal justice is predominantly committed to the care of the States. The power to define crimes belongs to Congress only as an appropriate means to carrying into execution its limited grant to legislative powers. U.S.C., Art 1, Sec. 8 • • • Broadly speaking, crimes in the United States are what the law of the individual States make them, subject to the limitations of Art. 1, Section 10(1), in the original Constitution prohibiting bills of attainder and ex post facto laws, and of the Thirteenth and Fourteenth Amendments."

Congress may define crimes only as an appropriate means of carrying into execution its limited grant of legislative powers under Article 1, Section 8, of the United States Constitution. The Federal courts have criminal jurisdiction only over crimes made punishable by specific acts of Congress validly enacted under the Constitution and

have no common law crime jurisdiction. *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 3 L.Ed. 259 (1812).

This Court has stated that where the application of Federal control is sought over activities which, considered in themselves, are understood to be entirely intrastate, it must appear that there is a close substantial relation to interstate commerce in order to justify federal intervention. *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964). Furthermore, the Court made it clear that the activity sought to be regulated must be commerce which concerns more than one State.

The danger to be avoided in allowing Congress to enact the Statute herein in question is the assumption of Federal criminal jurisdiction where none exists in view of the absence of a *close and substantial* relation to interstate commerce. Great caution must be exercised in the analysis of interstate activity so as to preclude an overanxious Congress from classifying any local activity as being in interstate or foreign commerce and usurping the prerogatives of our citizens and States. *Polish National Alliance v. Labor Board*, 322 U.S. 643, 650 (1944); *United States v. Denmark*, 346 U.S. 411, 462 (1953).

In *United States v. Bass*, 434 F.2d 1296 (2nd Cir. 1970), the Court of Appeals for the Second Circuit expressed grave doubts as to the constitutionality of Federal Legislation prohibiting the possession of firearms by a convicted felon, if such legislation were to be interpreted, as the Government insisted it should be, not to require proof of some connection to interstate commerce. This holding was not disturbed by the subsequent affirmation of this Court. See *United States v. Bass*, ____ U.S. ____, 30 L.Ed. 2d 488 (1971).

To vest jurisdiction in Congress to regulate the possession, whether it be (mere) possession or possession for purposes of distribution, of narcotics would be a more expansive constitutional construction than any heretofore considered. *Rewis v. United States*, 401 U.S. 808 (1971). To validate legislation similar to that which is under consideration in the instant case would certainly constitute a precedent which involves Congress and this Court in every area of criminal activity currently proscribed by the several States. If mere possession of narcotics is violative of Federal law, then "mere possession" of firearms by convicted felons, possession of stolen property which has not been involved in interstate commerce, and possession of alcoholic beverages could all be legitimate objects of Federal criminal jurisdiction. Under the statute herein considered, a man can be convicted without any proof of interstate movement or the use of the facilities of interstate commerce, or of facts showing that his conduct affected interstate commerce. It is apparent that the Framers of the Constitution never intended that the national Government might define as a crime and prosecute wholly local activity through the enactment of Federal criminal laws.

An examination of the "HEARINGS BEFORE THE SUB-COMMITTEE ON PUBLIC HEALTH AND WELFARE OF THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE — HOUSE OF REPRESENTATIVES. PARTS I AND II SERIAL NUMBERS 91-45 and 91-46, H.R. 11701 and H.R. 13743", ("Hearings") as held during the second session of the 91st Congress, of which this Court should take judicial notice, *are completely devoid of any reference to or discussion of any relationship between possession of narcotics and interstate*

or foreign commerce. At no time during the "Hearings" was there any discussion of any connection whatsoever concerning a relationship between drug abuse and organized crime.

It cannot be properly argued that, simply because Congress proclaimed, in Sec. 801 of Title 21, that it had made "Findings" relating the subject matter of the Act to interstate or foreign commerce, 21 U.S.C., §801 (1) (7), see Legislative History, 1970 U.S. Code Cong. & Adm. News, 4566, 4596, that such a recitation will suffice to avoid the constitutional difficulties. *United States v. Bass*, 434 F.2d. 1296, 1300 (2nd Cir. 1970).

Indicative of the fact that the "Findings" of Congress in this Act are invalid is the Supreme Court's opinion in *Leary v. United States*, 395 U.S. 6 (1969) which discussed the fourth Congressional finding of the Act which states: "Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances." The Supreme Court in *Leary* found that this is not a true statement regarding marijuana, which is a controlled substance under this Act. The holding in *Leary* clearly indicates that the Act is too broad and pervasive in its findings, and erroneous at that. The Defendant urges this Honorable Court to declare the Statutes in question unconstitutional and in so doing remind the Congress of this Court's admonition in *Leary*, supra, that "Congress, no less than we, is subject to constitutional requirements . . .", 395 U. S. at 53.

As stated by the Court, traditional concepts of Federal—State relationships in terms of criminal jurisdiction should not be usurped without great justification. *Bass*,

supra, 30 L.Ed. 2d. 488 (1971). Certainly, this Honorable Court may take judicial notice of the extensive and broad legislation which has been enacted by each and every State sought to be controlled by the Drug Abuse Prevention and Control Act. In this regard, this Court should note that Florida has proscribed the crime of manufacturing, distributing and dispensing any narcotic drug except as authorized by law and has made it unlawful to conspire to commit that offense. See Florida Statutes, Chapter 398, F.S.A. (known as the Uniform Narcotic Drug Law) and Chapter 833, Florida Statutes, F.S.A. It staggers the imagination to realize that under the Act, practically purely intrastate narcotics activity could now be subject matter of Federal prosecution. The obvious extension of Federal control into intrastate activities involving immense numbers of drug related crimes will clearly alter Federal-State relationships and over extend limited Federal Police resources. *Cf. Rewis v. United States, supra.*

The Defendant further contends that the Tenth Amendment to the Constitution of the United States is violated by the Statutes herein in question in that the police power reserved to the States by the Amendment is being infringed upon by the Act. The Act invades State's rights in the area of control of narcotics on an intrastate basis, and obviously, the State police rights in this area are replaced by Federal law and Federal power in contravention of the Constitution. In *Younger v. Harris*, 401 U. S. 37 (1971), this Court discussed the concept of "Federalism". It stated:

> "The concept does not mean blind deference to 'State's rights' *any more than it means centralization of control over every important issue in our*

National Government and its Courts. The Framers rejeceted both these courses." 401 U. S. at 44.

Thus, though there is no question that Drug abuse constitutes an evil which must be effectively controlled, it is dealt with quite thoroughly by State law, and centralization of enforcement or control in these circumstances is inconsistent with the intent of the Framers of the Constitution. That is, the National Government has strayed into an area not found to be wanting in State attention and which has needlessly resulted in "centralization of control".

CONCLUSION

The Petition for Certiorari should be granted and the judgment of the Court of Appeals reversed.

Respectfully submitted,

HARVEY S. SWICKLE
Attorney for Petitioner
420 Lincoln Road
Miami Beach, Florida 33139

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals, Fifth Circuit, was served this 30th day of November, 1972, upon the following persons by depositing a copy of same addressed to each in the United States Mail with sufficient postage prepaid.

Honorable Robert Rust
United States Attorney
14 N. E. First Avenue
Miami, Florida

and

Solicitor General of the United States
United States Department of Justice
Washington, D. C. 20530

HARVEY S. SWICKLE
Attorney for Petitioner
420 Lincoln Road
Miami Beach, Florida 33139

APPENDIX

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-2325
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

SCOTT LEISNER and STEVEN ZATSKY,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Florida

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(November 2, 1972)

Before GEWIN, AINSWORTH and SIMPSON,
Circuit Judges.

PER CURIAM: Appellants were convicted of violation of Comprehensive Drug Abuse Prevention and Control

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*Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409.

Act of 1970, 21 U.S.C. §§841(a)(1), 846. The sole contention on appeal is that the Act is unconstitutional because it fails to require proof of a specific connection between the prohibited drugs and interstate commerce as a prerequisite for conviction. This identical contention has been considered and rejected by us several times. See United States v. Amado Lopez, 5 Cir., 1972, 459 F.2d 949; United States v. Jesse Lane, et al., 5 Cir., 1972, ___ F.2d ___ [No. 71-3140, June 2]; United States v. Alberto Lopez, et al., 5 Cir., 1972, ___ F.2d ___ [No. 71-3227, June 6]; United States v. Robert Gordon Mather, 5 Cir., 1972, ___ F.2d ___ [No. 72-1280, August 2].

AFFIRMED.

APPENDIX B

Grand Jury No. 8027

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

NO. 72-167-CR-King

21 USC, Section 846

M/S $25,000 — 15 years

21 USC, Section 841(a)(1)

M/S $25,000 — 15 years

18 USC, Section 2

UNITED STATES OF AMERICA

v.

SCOTT LEISNER, STEVEN ZATSKY, MARC SAPERSTEIN, JOSEPH MORENO, RICHARD DAVIS, LEONICIO RAFAEL ESTEVES, a/k/a Herman, and JOHN DOE, a/k/a Carlos

INDICTMENT

[Filed Mar. 9, 1972]

The Grand Jury charges:

COUNT I

On or about February 1, 1972, and continuing until February 29, 1972, at Miami, Dade County, in the Southern District of Florida, the defendants,

SCOTT LEISNER,
STEVEN ZATSKY,
MARC SAPERSTEIN,
JOSEPH MORENO,
RICHARD DAVIS,
LEONICIO RAFAEL ESTEVES,
a/k/a Herman, and
JOHN DOE, a/k/a Carlos,

did knowingly, intentionally and wilfully combine, conspire, confederate and agree, and have a tacit understanding with each other, and with divers other persons whose names are to the Grand Jury unknown, to commit offenses against the United States of America, to-wit: to violate Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2, and it was the purpose and goal of such conspiracy to:

1. Negotiate for the sale of three pounds of a Schedule II narcotic controlled substance, to-wit: cocaine, for the price of $28,000.

2. Negotiate further for the sale of 6.6 pounds of a Schedule II narcotic controlled substance, to-wit: cocaine, for the price of $60,000.

3. Knowingly and intentionally possess with intent to distribute quantities of a Schedule II narcotic controlled substance, to-wit: cocaine.

4. Knowingly and intentionally distribute quantities of a Schedule II narcotic controlled substance, to-wit: cocaine.

The Grand Jury further charges that the said defendants, in furtherance of said conspiracy, and for the purpose of effectuating the goals of said conspiracy, did at or about the times and places hereinafter referred to, commit certain overt acts, among which are the following:

OVERT ACTS

1. On or about February 14, 1972, at Miami, Florida, defendant Marc Saperstein telephoned an agent of the Bureau of Narcotics and Dangerous Drugs.

2. On or about February 14, 1972, at Miami, Florida, defendants Marc Saperstein, Richard Davis and John Doe a/k/a Carlos met with agents of the Bureau of Narcotics and Dangerous Drugs at Papy's Pizza, 1118 South Dixie Highway.

3. On or about February 29, 1972, at Miami, Florida, defendants Scott Leisner and Steven Zatsky met with an agent of the Bureau of Narcotics and Dangerous Drugs at the Vizcaya Apartments, 150 S. E. 25th Road.

4. On or about February 29, 1972, at Miami, Florida, defendants Scott Leisner, Joseph Moreno and Leonicio Rafael Esteves a/k/a Herman were at a residence at 1605 N. E. 178th Street.

All in violation of Title 21, United States Code, Section 846.

COUNT II

On or about February 14, 1972, at Miami, Dade County, in the Southern District of Florida, the defendants,

MARC SAPERSTEIN,
RICHARD DAVIS, and
JOHN DOE, a/k/a Carlos,

did knowingly and intentionally possess with intent to distribute approximately 1.29 grams of cocaine, a Schedule II narcotic controlled substance; in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT III

On or about February 14, 1972, at Miami, Dade County, in the Southern District of Florida, the defendants,

MARC SAPERSTEIN,

RICHARD DAVIS, and

JOHN DOE, a/k/a Carlos,

did knowingly and intentionally distribute approximately 1.29 grams of cocaine, a Schedule II narcotic controlled substance; in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT IV

On or about February 14, 1972, at Miami, Dade County, in the Southern District of Florida, the defendant,

SCOTT LEISNER,

did knowingly and intentionally possess with intent to distribute approximately .48 grams of cocaine, a Schedule II narcotic controlled substance; in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT V

On or about February 14, 1972, at Miami, Dade County, in the Southern District of Florida, the defendant,

SCOTT LEISNER,

did knowingly and intentionally distribute approximately .48 grams of cocaine, a Schedule II narcotic controlled substance; in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT VI

On or about February 29, 1972, at Miami, Dade County, in the Southern District of Florida, the defendants,

JOSEPH MORENO and
SCOTT LEISNER,

did knowingly and intentionally possess with intent to distribute approximately two grams of cocaine, a Schedule II narcotic controlled substance; in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT VII

On or about February 29, 1972, at Miami, Dade County, in the Southern District of Florida, the defendants,

JOSEPH MORENO and
SCOTT LEISNER,

did knowingly and intentionally distribute approximately two grams of cocaine, a Schedule II narcotic controlled substance; in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT VIII

On or about February 29, 1972, at Miami, Dade County, in the Southern District of Florida, the defendants,

JOSEPH MORENO,
SCOTT LEISNER, and
LEONICIO RAFAEL ESTEVES,
a/k/a Herman,

did knowingly and intentionally possess with intent to distribute approximately 86 grams of cocaine, a Schedule II narcotic controlled substance; in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT IX

On or about February 29, 1972, at Miami, Dade County, in the Southern District of Florida, the defendants,

JOSEPH MORENO,
SCOTT LEISNER, and
LEONICIO RAFAEL ESTEVES,
a/k/a Herman,

did knowingly and intentionally distribute approximately 86 grams of cocaine, a Schedule II narcotic controlled substance; in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

A TRUE BILL

/s/ Edward A. Ridolph, Sr.
FOREMAN

ROBERT W. RUST
UNITED STATES ATTORNEY

By /s/ Michael P. Sullivan
Michael P. Sullivan
Assistant United States Attorney